

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Implementation Issues Under the Public Utility Regulatory Policies Act of 1978) Docket No. AD16-16-000)

SUPPLEMENTAL COMMENTS OF THE SOUTHERN ENVIRONMENTAL LAW CENTER, ENVIRONMENTAL LAW AND POLICY CENTER, VOTE SOLAR, PACE ENERGY AND CLIMATE CENTER, NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION, CLIMATE + ENERGY PROJECT, CENTER FOR BIOLOGICAL DIVERSITY, AND SIERRA CLUB

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The Southern Environmental Law Center (“SELC”), Environmental Law and Policy Center (“ELPC”), Vote Solar, Pace Energy and Climate Center, North Carolina Sustainable Energy Association, Climate + Energy Project, Center for Biological Diversity, and Sierra Club (collectively, “Public Interest Organizations”) thank the Commission for the opportunity submit additional comments in advance of potential rulemaking activity under Section 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”). The Public Interest Organizations include national, regional, and state environmental, renewable energy, and public interest organizations from across the United States that work to promote renewable energy, energy efficiency, and demand-side resources, and to protect natural resources, the environment, and public health. Collectively, the Public Interest Organizations have extensive experience intervening in state regulatory proceedings implementing PURPA, participating in FERC proceedings involving PURPA implementation and wholesale power markets, and developing PURPA policy solutions. The Public Interest Organizations submit these comments to emphasize that PURPA remains a critical policy for the encouragement of small independent power production and to respond to prior comments advocating for PURPA reform.

Congress enacted PURPA in 1978 to encourage the development of small power production and cogeneration facilities (collectively “qualifying facilities”) and directed the Commission to prescribe rules to achieve this statutory directive.¹ Congress amended PURPA in 2005 to allow utilities to request a waiver of their mandatory purchase obligation in areas in which qualifying facilities have nondiscriminatory access to certain markets in which to sell energy and capacity, and PURPA’s statutory mandate continues to require the Commission to

¹ 16 U.S.C. § 824a-3(a); *FERC v. Mississippi*, 456 U.S. 742, 750, 102 S. Ct. 2126, 2132, 72 L. Ed. 2d 532 (1982).

encourage the development of qualifying facilities where qualifying facilities lack access to such markets.²

In many states, PURPA remains a vital tool to achieve the goals Congress established when it enacted the statute. However, many states and utilities have failed to implement PURPA in a manner consistent with its congressional intent to encourage the development of qualifying facilities. While some commenters claim that all qualifying facilities have nondiscriminatory access to markets, these claims ignore persistent barriers that discourage the development of qualifying facilities and frustrate Congress's intent in enacting and maintaining PURPA.

The Public Interest Organizations respectfully recommend that any Commission review of its PURPA regulations should include a robust 50-state survey of PURPA implementation by state regulatory authorities and nonregulated electric utilities in order to accomplish the following:

- (1) To determine where PURPA implementation does not comply with PURPA and the Commission's regulations;
- (2) To investigate existing barriers in wholesale markets that prevent nondiscriminatory access for qualifying facilities; and
- (3) To evaluate opportunities to strengthen PURPA's implementation.

I. PURPA Is Still Relevant and Necessary Today.

Forty years after PURPA was signed into law, it continues to play an important role in encouraging the development of qualifying facilities. In many states, PURPA is the only legal tool available to support the development of independent power producers that promote energy independence, reduce reliance on fossil fuel generation, and provide low-cost renewable energy to ratepayers.

² Energy Policy Act of 2005, 16 U.S.C. § 824a-3(m).

When Congress enacted PURPA, independent power producers faced discrimination at the hands of vertically integrated monopoly utilities. Because these utilities were the only purchasers of wholesale electricity, they used their market power to shut out independent power producers. At the same time, some utilities' resource decisions left customers paying for billions of dollars of cost overruns. These utilities' reliance on fossil fuel generation also highlighted the industry's vulnerability to major fluctuations in the price of fuel.

Today, many of the same problems Congress enacted PURPA to remedy still exist. In regions without independent system operators ("ISOs") or regional transmission organizations ("RTOs"), qualifying facilities lack adequate markets in which to sell their energy and capacity. In these regions, vertically integrated utilities maintain their monopsony (or "buyer's monopoly") power to suppress independent power generators. PURPA is one of the only legal tools in these regions to create any semblance of competition with vertically integrated monopoly utilities and to provide a market for power from qualifying facilities.

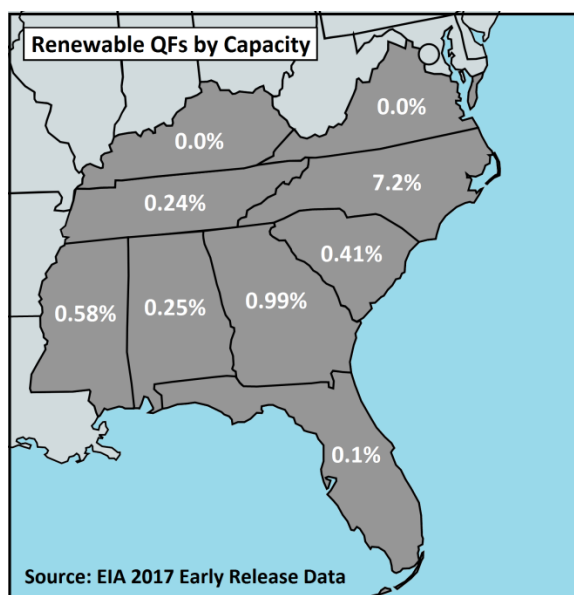
In regions with ISOs/RTOs, qualifying facilities – particularly smaller ones – continue to face difficulties accessing the wholesale market on a nondiscriminatory basis in a manner consistent with Congress's intent in enacting PURPA and its later amendments.³ The lack of nondiscriminatory access to these wholesale markets for facilities 20 MW and smaller is as real today as it was when the Commission first issued Order No. 688.⁴

As a result of inadequate PURPA implementation and prohibitively high barriers to entry, small power production qualifying facilities still represent only a small percentage of generation

³ This issue is discussed in greater detail in Section III.A, below.

⁴ See Order No. 688, 71 FR 64342-01 (2006) ("Order No. 688"); see also Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007) ("Order No. 688-A"); 18 C.F.R. § 292.309(d).

capacity across the country. For example, wind and solar qualifying facilities in the Southeast under PURPA represent one percent or less of total generation in eight out of nine states.⁵



Similarly, in the Midwest, wind and solar qualifying facilities represent only 2.6 percent of total capacity in Michigan and 0.4 percent of total capacity in Wisconsin.⁶ Indiana has no qualifying small power production facilities with contracts executed through PURPA.⁷

While qualifying facilities continue to face prohibitively high barriers to entry, vertically integrated utilities continue to make the type of costly resource decisions that led Congress to enact PURPA in the first place. For example, massive generation investments in some states continue to make retail customers pay for billions of dollars of cost overruns, and in some cases, payment for facilities that will never achieve commercial operation. Uneconomical coal plants around the country continue to burden ratepayers with expensive power or stranded costs, and

⁵ These statistics are based on 2017 EIA Early Release data. North Carolina, which has more PURPA qualifying facilities than any other state, has provided long-term fixed standard offer contracts to qualifying facilities at an avoided cost rate determined through a robust administrative proceeding allowing for significant stakeholder participation. This proper implementation of PURPA by the North Carolina Utilities Commission has encouraged significant development of small independent power producers in the state.

⁶ *Id.*

⁷ Based on 2016 and 2017 (Early Release) EIA data cross-referenced with Indiana Utility Regulatory Commission's draft Statewide Resource Analysis.

over-investment in gas generation puts customers at risk of future fuel cost volatility.⁸ For example:

- Georgia Power's Vogtle nuclear plant is projected to cost over \$27 billion, more than double its initial estimate, and is more than five years behind schedule;⁹
- Mississippi Power's Kemper gasification combined cycle project cost \$7.5 billion before being canceled;¹⁰
- In South Carolina, SCANA spent \$9 billion for the partial construction of the V.C. Summer nuclear plant before cancelling construction, saddling ratepayers with the expense of a plant that will never generate a single kilowatt-hour;¹¹
- In Wisconsin, coal-fired power plant overbuilds have resulted in customers paying nearly 40% more than they did in 2005, including \$700 million of stranded costs of a coal plant closed 25 years early;¹² and
- In North and South Carolina, Duke Energy spent \$541 million on the Lee Nuclear Station before cancelling construction of the plant.¹³

Monopoly utilities often characterize PURPA as an outdated statute that must be “modernized.” These arguments for PURPA “reform” often overlook the majority of states that have not implemented PURPA properly. They also exaggerate opportunities for qualifying facilities to access existing wholesale markets, and ignore the benefits that ratepayers receive

⁸ For example, Florida Power & Light's generation mix includes approximately 70 percent natural gas. *See*, Moody's Investors Service, “Florida Power & Light: Update to Credit Analysis” at 5 (August 3, 2018).

⁹ *See*, The Wall Street Journal, “Southern Co. Earnings Hurt by Cost Overruns at Nuclear-Power Plant” (August 8, 2018) <https://www.wsj.com/articles/southern-co-earnings-hurt-by-cost-overruns-at-nuclear-power-plant-1533742372> (last accessed September 11, 2018).

¹⁰ *See*, The Guardian, “How America's Clean Coal Dream Unravelling” (March 2, 2018), <https://www.theguardian.com/environment/2018/mar/02/clean-coal-america-kemper-power-plant> (last accessed September 11, 2018).

¹¹ *See*, The Wall Street Journal, “The \$4.7 Billion Nuclear Bill That No One Wants to Pay” (August 25, 2018), <https://www.wsj.com/articles/the-4-7-billion-nuclear-bill-that-no-one-wants-to-pay-1535194801> (last accessed September 11, 2018).

¹² *See*, Milwaukee Journal Sentinel, “WEC Energy bets on solar, wind and natural Gas. What about coal?” (July 20, 2018), <https://www.jsonline.com/story/money/business/energy/2018/07/20/solar-and-wind-power-get-cheaper-wec-energy-adapts/780631002/> (last accessed September 11, 2018); Sierra Club Beyond Coal Campaign, “Oak Creek/Elm Cove – 2010 Update”, <https://content.sierraclub.org/coal/environmentallaw/plant/oak-creek-elm-road> (last accessed September 11, 2018).

¹³ *See*, Charlotte Business Journal, “Duke Energy abandons plans to build the Lee Nuclear Station” (Aug. 25, 2017), <https://www.bizjournals.com/charlotte/news/2017/08/25/duke-energy-abandons-plans-to-build-the-lee.html>.

from the development of qualifying facilities. Any Commission review of the PURPA regulations should include an investigation into what improvements can be made to ensure states properly implement PURPA, consistent with Congress's policy goals embodied in PURPA, and with PURPA's ongoing directive that the Commission encourage the development of qualifying facilities.

II. Many States and Utilities Fail to Comply with Existing PURPA Regulations.

Under PURPA's cooperative federalism structure, state regulatory authorities and nonregulated electric utilities implement the Commission's PURPA regulations.¹⁴ While states and nonregulated utilities have some flexibility in how they implement PURPA, they are nonetheless required to implement these regulations consistent with Congress's intent in enacting PURPA, and with the Commission's regulations. Many states, however, fail to implement PURPA in a manner that satisfies Congress's goal of encouraging the development of qualifying facilities and ensuring that qualifying facilities have non-discriminatory access to wholesale markets on a level-playing field.

A. Some States and Nonregulated Utilities Fail to Follow All Avoided Cost Rate Requirements.

PURPA's regulations plainly allow qualifying facilities the option of receiving long-term, forecasted avoided cost rates.¹⁵ As the Commission has repeatedly and consistently emphasized, forecasted avoided cost rates are critical to a qualifying facility's ability to obtain the capital necessary to develop a project.¹⁶

¹⁴ 16 U.S.C. § 824a-3(f).

¹⁵ 18 C.F.R. § 292.304(d).

¹⁶ See e.g., *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880, *order on reh'g sub nom.* Order No. 69 A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983); *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61134 (Nov. 22, 2016).

Some states, however, still do not provide qualifying facilities access to long-term, forecasted avoided cost rates under PURPA. For example, in Indiana, ELPC and Citizens Action Coalition of Indiana recently filed with the Indiana Utility Regulatory Commission (“IURC”) objections to the annual PURPA avoided cost filings for all five of Indiana’s investor-owned utilities, alleging that the utilities fail to offer forecasted avoided cost rates.¹⁷ In their responses to the objections, some of the utilities affirmed that they do not offer long-term forecasted rates, and instead, only offer short-term rates of one-year or less.¹⁸ Nonetheless, on May 2, 2018, the IRUC declined to act on the objections, leaving utilities in Indiana free to continue offering only non-financeable short-term PURPA contracts with a forecasted rate option no longer than one year.

In the Southeast, Alabama Power Company offers qualifying facilities contracts in which avoided cost rates are updated annually; Virginia Electric and Power Company offers qualifying facilities short-term market-based rates; and the Tennessee Valley Authority offers qualifying facilities contracts in which avoided cost rates are updated monthly.¹⁹ As a result of these policies, these utilities have seen little to no development of qualifying facilities because

¹⁷ See Objection to Duke Energy Indiana 30-day filing No. 50119 (Mar. 23, 2018), *archived at* <https://perma.cc/WQ6R-XH3D>; Objection to Northern Indiana Public Service Company 30-day filing No. 50122 (Mar. 23, 2018), *archived at* <https://perma.cc/32AX-Q3NE>; Objection to Indianapolis Power & Light 30-day filing No. 50123 (Mar. 23, 2018), *archived at* <https://perma.cc/CX3U-342R>; Objection to Southern Indiana Gas and Electric Company (d/b/a Vectren) 30-day filing No. 50124 (Mar. 23, 2018), *archived at* <https://perma.cc/DRD7-2MD4>; and Objection to Indiana Michigan Power Company 30-day filing No. 50125 (Mar. 23, 2018), *archived at* <https://perma.cc/L8V2-3R2L>. The objections to Northern Indiana Power Supply Company and Duke Energy Indiana contained an affidavit from a PURPA qualifying facility developer affirming that both utilities declined to provide forecasted rates when the developer attempted to negotiate a PURPA contract.

¹⁸ See, e.g., Duke Energy Indiana’s Response to Objection at *2 (April 2, 2018), *archived at* <https://perma.cc/4AK5-HEXX> (“Duke Energy Indiana’s standard offer at this time is one year. This would include a fixed rate at that year’s prevailing Rider 50 tariff.”). One of the utilities even argued that fixed rates over a one-year contract “should be sufficient to obtain third-party financing” for qualifying facilities.

¹⁹ See, Ala. Power Co., “Rate CPE”; Va. Elec. & Power Co., “Schedule 19”; TVA, “Dispersed Power Price Schedule CSPP.”

developers are unable to obtain long-term contracts at forecasted rates.²⁰ Further, utilities continue to propose contract terms that will discourage qualifying facility development. On September 7, 2018, Duke Energy Florida, LLC filed a Petition for Declaratory Statement with the Florida Public Service Commission requesting that negotiated contracts with qualifying facilities be limited to two-year terms.²¹ In support of its petition, Duke Energy cited PURPA tariffs in Alabama and Tennessee, which have not supported qualifying facility development.²²

Some states also improperly limit capacity payments for certain qualifying facilities, or otherwise fail to establish avoided cost rates consistent with the Commission's regulations.²³ Some states do not require electric utilities to maintain avoided cost data for public inspection, as required by 18 C.F.R. § 292.302(b); others allow utilities to use trade-secret protections to shield this information from public inspection.²⁴ Any Commission review of its regulations should include an analysis of state implementation of avoided cost requirements to determine where states or utilities are not properly implementing PURPA and the Commission's regulations.

²⁰ To our knowledge, Alabama Power Company has no wind or solar qualifying facilities greater than 1 MW selling energy and capacity under a PURPA contract in its service territory. In the 2016 North Carolina biennial avoided cost proceeding, a Dominion witness testified that QF activity in Dominion's Virginia service territory is "minimal". NCUC Docket No. E-100, Sub 148, 2016 Biennial Avoided Cost Proceeding, Transcript of Testimony 4/20/2017, Vol. VI, p. 101, ln. 23-24. TVA has no qualifying facilities greater than 1 MW.

²¹ Fla. Pub. Serv. Comm., Duke Energy Florida, LLC's Petition for Declaratory Statement regarding PURPA solar qualifying facility power purchase agreements, Undocketed (Sept. 7, 2018), <http://www.psc.state.fl.us/library/filings/2018/05895-2018/05895-2018.pdf>.

²² *Id.* at 14. The North Carolina Utilities Commission rejected a similar proposal by Duke Energy to update avoided cost rates in new PURPA contracts every two years in the last biennial avoided cost proceeding. North Carolina Utilities Commission, Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100 Sub 148 (Oct. 11, 2017).

²³ For example, an Alabama statute expressly excludes capacity payments for qualifying facilities of 100 kW and less. Ala. Code § 37-4-140.

²⁴ For example, all three of the investor-owned utilities in Minnesota annually file avoided cost information with the Minnesota Public Utilities Commission as required by 18 C.F.R. § 292.302(b), but each utility uses trade-secret protections to shield from public view the information required by 18 C.F.R. §§ 292.302(b)(1)-(3). *See, e.g.*, Schedule A attached to Xcel Energy's 2018 Cogeneration and Small Power Production Report and Petition, Docket No. E999/PR-18-9 (Minn. Pub. Util. Comm'n Jan. 2, 2018). Additionally, in response to a Freedom of Information Act request from the Southern Environmental Law Center, TVA first stated that it did not maintain the data at all, then argued that some of the data was exempt from FOIA as confidential business information.

B. Some States and Nonregulated Utilities Impermissibly Limit the Formation of Legally Enforceable Obligations.

The Commission has recognized a qualifying facility's "unconditional right" to choose whether to sell its power "as available" or pursuant to a legally enforceable obligation ("LEO").²⁵ In Order No. 69, the Commission stated that the "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility."²⁶

Under the Commission's existing regulations, state regulatory authorities and nonregulated electric utilities have discretion to determine when a LEO is created. Some states exercise their discretion to establish LEO requirements by statute or regulation, and others establish LEO requirements on a case-by-case basis. However, even under the existing Commission regulations, a number of states have imposed LEO standards that improperly limit LEO formation and deny qualifying facilities the meaningful opportunity to enter into a LEO that Congress envisioned when it enacted PURPA.

In recent years, in response to complaints from qualifying facilities regarding these overly restrictive standards, the Commission has found that a number of requirements for the formation of LEOs do not comply with PURPA. In these proceedings, for example, the Commission has properly held that requiring a fully executed power purchase agreement,²⁷ a fully executed interconnection agreement,²⁸ a completed system impact study,²⁹ or requiring a

²⁵ See, e.g. *FLS Energy, Inc.*, 157 FERC ¶ 61211 (2016).

²⁶ *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

²⁷ *Cedar Creek Wind, LLC*, 137 FERC ¶ 61006 (2011).

²⁸ *FLS Energy, Inc.*, 157 FERC ¶ 61211 (2016).

²⁹ *Id.*

qualifying facility to win a competitive solicitation³⁰ prior to LEO formation did not comply with PURPA and the Commission’s regulations. The Commission has also affirmed that requiring qualifying facilities to sell “firm power” as a prerequisite to LEO formation is inconsistent with PURPA.³¹

Some commenters suggest that the Commission should establish “viability” standards for LEO formation.³² However, such standards have nothing to do with the cornerstone of LEO formation – whether the qualifying facility has unequivocally committed to sell its output to the utility – and thus give utilities an additional tool to limit unduly the ability of qualifying facilities to sell energy or capacity pursuant to a LEO. These standards would effectively cease any development of qualifying facilities because they: (1) improperly require qualifying facilities to expend large sums of capital on project development before having certainty as to the price at which they will be able to sell their output and thus the economic viability of their project; and (2) subject qualifying facilities to increased administrative, legal, and financial burdens if they must seek relief from the Commission, the state authority, or through the courts under a newly implemented and more restrictive standard. As discussed above, states already have discretion to establish a LEO standard within the parameters of PURPA, and any Commission review of its rules should include an evaluation of existing LEO formation standards in each state.

³⁰ *Hydrodynamics Inc.*, 146 FERC ¶ 61193 (2014).

³¹ *JD Wind I, LLC*, 129 FERC ¶ 61148, 61633 (Nov. 19, 2009); *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61134 (Nov. 22, 2016) (“[R]egardless of whether a qualifying facility can provide firm output, that qualifying facility has the option to sell its output pursuant to a legally enforceable obligation with a forecasted avoided cost rate.”).

³² See Supplemental Comments of the Edison Electric Institute, FERC Docket No. AD16-16-000 (June 25, 2018) (hereinafter “EEI Supplemental Comments”).

III. Calls to Reform PURPA Ignore the Remaining Barriers to Market Entry That Qualifying Facilities Face and Overstate the Need for Reform.

A. Wholesale Markets Continue to Pose Barriers to Access for Qualifying Facilities Under 20 MW.

The Edison Electric Institute (“EEI”) argues that the Commission should update its regulations to “eliminate[] or significantly reduce[]” the 20-MW threshold below which electric utilities must purchase energy and capacity from QFs unless they can obtain a waiver.³³ EEI’s position is that markets administered by ISOs/RTOs provide qualifying facilities nondiscriminatory access to wholesale markets for QFs of all sizes.³⁴ This argument fails for several reasons. First, many states lack access to ISO/RTO-administered wholesale markets.³⁵ Second, other states participate in wholesale markets that the Commission has previously determined do not uniformly provide nondiscriminatory access for even larger QFs. Finally, even where wholesale markets exist that the Commission has found satisfy the Section 210(m)(1) standards, practical barriers for small QFs still prevent them from selling energy and capacity on equal footing.

There are 21 states with retail service territories outside of FERC-approved ISOs/RTOs: Missouri, Kentucky, Florida, Georgia, Alabama, Mississippi, South Carolina, North Carolina, Tennessee, New Mexico, Arizona, Colorado, Utah, Nevada, Wyoming, Montana, Idaho, Oregon, Washington, Alaska, and Hawaii. Qualifying facilities in these 21 states still do not have non-

³³ EEI Supplemental Comments at 6; *see also* Appendix A to EEI Supplemental Comments at 11-13.

³⁴ *Id.* at 3-4.

³⁵ In order to qualify as a market to which qualifying facilities have non-discriminatory access, PURPA requires markets to be (A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or (B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or (C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B). 16 U.S.C. § 824a-3(m)(1).

discriminatory access to RTO-administered wholesale markets, because such markets do not exist there. However, PURPA still gives qualifying facilities in these states the right to sell their output to utilities.³⁶

Second, the Commission has previously declined to find that California and states with utilities that participate in the Southwest Power Pool provide meaningful opportunities to sell energy and capacity within the meaning of Section 210(m)(1)(B)(ii).³⁷ The Commission determined that it was appropriate to leave such determinations to a case-by-case assessment,³⁸ and EEI presents no evidence or argument that this approach has not worked appropriately or must be changed.³⁹ Thus, the Commission should continue to require utilities in those markets to present evidence sufficient to justify terminating the mandatory purchase obligation.⁴⁰

Even the five markets that the Commission determined meet the requirements of Section 210(m)(1) in Order No. 688—MISO, PJM, NYISO, ISO-NE, and ERCOT—do not provide nondiscriminatory treatment to qualifying facilities smaller than 20 MW, and in some cases to those larger than 20 MW, for the reasons described below. We urge the Commission to retain its current framework in which utilities must overcome the presumption that smaller QFs lack nondiscriminatory access to markets meeting the requirements of Section 210(m)(1). The *rebuttable presumption* that QFs 20 MW and smaller lack nondiscriminatory access to such markets correctly places the burden on utilities to demonstrate – via a petition to the Commission for a waiver of their purchase obligation – that the small QF in fact has nondiscriminatory access

³⁶ Arguments relating to whether the mandatory purchase obligation should be removed in these states are discussed in Section B, below.

³⁷ See e.g., Order 688-A at P 38.

³⁸ Order 688 at P 145; Order 688-A at PP 38-39.

³⁹ The Commission subsequently found that wholesale markets in CAISO satisfied the conditions of Section 210(m)(1)(C). See *Pac. Gas & Elec. Co. San Diego Gas & Elec. Co. S. California Edison Co.*, 135 FERC ¶ 61234 (June 16, 2011). The Commission has also granted waivers pursuant to Section 210(m)(1) to electric utilities in the Southwest Power Pool. See, e.g. *Arkansas Elec. Coop. Corp.*, 153 FERC ¶ 62162 (Dec. 4, 2015).

⁴⁰ Order 688 at P 11.

to adequate wholesale markets, rather than placing that burden on small and likely less sophisticated generators.⁴¹ This allocation of the burden is consistent with the purpose of Section 210 of PURPA, which was to “encourage the development of cogeneration and small power production facilities,” *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404 (1983).

In recent years, the Commission has denied multiple petitions by electric utilities to waive their mandatory purchase obligations for certain qualifying facilities smaller than 20 MW, and in doing so, re-emphasized the continuing policy rationale for the 20 MW threshold.

In 2013, an electric utility in PJM requested that the Commission waive the utility’s purchase obligation for an 18 MW cogeneration qualifying facility.⁴² The Commission denied the utility’s request and found that the utility failed to demonstrate that the qualifying facility had overcome the greater practical difficulties faced by small qualifying facilities in participating in power markets. The Commission noted that this difficulty is what justified the rebuttable presumption adopted in Order No. 688 in the first place.

Similarly in 2015, an electric utility in MISO requested that the Commission waive the utility’s purchase obligation for an 18 MW run-of-the-river hydroelectric qualifying facility.⁴³ The Commission denied the request, finding that the utility failed to rebut the presumption that the qualifying facility lacked nondiscriminatory access. The Commission found that the conditions that led to the 20 MW threshold in Order No. 688 were still present, including interconnection issues, pancaked rates, operational limitations and administrative cost burdens that prevent nondiscriminatory access.

⁴¹ See Commission Order No. 688-A at 55 (“Moreover, any QF above 20 MW is permitted to demonstrate an inability to access the markets, and any electric utility is permitted to demonstrate that a QF 20 MW or smaller is able to access the markets.”)

⁴² *PPL Elec. Utilities Corp.*, 145 FERC ¶ 61053, 61386 (Oct. 17, 2013), *reh’g denied*, 148 FERC ¶ 61,207 (2014).

⁴³ *N. States Power Co., A Minnesota Corp.*, 151 FERC ¶ 61110 (May 14, 2015).

EEI's central reason why the distinction the Commission has drawn between QFs smaller than 20 MW and larger QFs is no longer valid is that the Commission's "precedent has evolved on what constitutes a 'small generator.'" But EEI fails to explain how the Commission's "evolving precedent" on small generators is relevant to the Commission's prior judgment that 20 MW was a reasonable point of demarcation for which an entity would bear the burden of proof regarding nondiscriminatory access to markets.⁴⁴

For example, EEI cites Order 792, the Commission's 2013 revisions of the Small Generator Interconnection Procedures and Small Generation Interconnection Agreement, as evidence that the Commission's view of what constitutes a small generator has changed. In Order 792, the Commission adjusted the size thresholds for generation facilities eligible for the Fast Track interconnection process, but this was based on the Commission's judgment about how to streamline the interconnection process while maintaining the safety and reliability of the grid.⁴⁵ That engineering-driven decision has no bearing on the question of whether a unit has nondiscriminatory access to markets to sell their capacity and energy.

EEI also cites Order 841 and the Commission's ongoing proceedings regarding participation of aggregated distributed energy resources in wholesale markets. These proceedings do show that the Commission is attentive to the barriers that small generators and energy storage resources face in accessing wholesale markets, but they do not establish that 20 MW is no longer a useful size threshold to demarcate generators that are likely to face obstacles to market access from those that are more likely than not to have adequate access. The Commission selected 20 MW as a reasonable threshold based on a record showing that smaller QFs are less able to bear the cost of transmission charges and membership fees associated with

⁴⁴ Order 688 at P 76.

⁴⁵ Order 792 at P 103.

accessing markets, and may lack the staff or resources to implement software and monitoring equipment necessary to integrate into RTO-administered markets.⁴⁶ EEI presents no reason for the Commission to reconsider that judgment.

Further, RTO market opportunities for distributed energy resources generally rely upon aggregating those resources for sale in RTOs, which can be administratively burdensome, difficult to orchestrate for resource owners, and reduce market compensation for those resources by forcing all resources within an aggregation to be compensated at the lowest common denominator of service for all of the resources in an aggregation. For example, if one small resource has a high capacity value but other resources in the aggregation have a lower capacity value such that the total nameplate capacity of the aggregation is not available during the measurement window, then the aggregation as a whole will receive lower compensation. The Commission's efforts to expand market access for smaller resources are to be lauded, but that does not mean that these resources can truly compete on equal terms with larger resources in the RTO markets.

EEI also contends that reducing the 20 MW threshold will "minimize gaming of FERC's regulations,"⁴⁷ but does not provide any evidence that gaming actually occurs, or that the Commission has failed to prevent it. In Order 688, the Commission stated:⁴⁸

[T]he Commission will not allow for gaming of this 20 MW rebuttable presumption. If parties are concerned that a QF has engaged in such gaming with regard to the certification or siting of a particular facility, we encourage those parties to bring their concerns to our attention. In any such proceeding, we will consider all relevant factors, including, but not limited to, ownership, proximity of facilities, and whether facilities share a point of interconnection. For purposes of evaluating proximity of facilities with regard to alleged gaming of this rebuttable presumption, we will not be bound by the one-mile standard set forth in 18 C.F.R. § 292.204(a)(2).

⁴⁶ Order 688 at PP 58, 68.

⁴⁷ EEI Supplemental Comments, Appendix A at 13.

⁴⁸ Order 688 at P 77.

EEI offers no evidence that the Commission has not been responsive to concerns about gaming, such that the only way to prevent such gaming is to eliminate any rebuttable presumption regarding smaller QFs.

For the reasons described above, the Commission should not reduce the 20 MW threshold for smaller qualifying facilities because these facilities continue to lack nondiscriminatory access to wholesale markets in which to sell energy and capacity.

B. The Commission Should Not Assume that Competitive Solicitations Provide Nondiscriminatory Access to Bilateral Markets for QFs.

Some commenters argue that competitive solicitation for new utility capacity additions provide qualifying facilities access to a nondiscriminatory market in states outside of FERC-approved ISO/RTO wholesale markets. This argument fails to account for the fact that competitive solicitation is not required in many states, and in the states that do require some form of competitive solicitation, many utilities do not regularly hold competitive solicitations, do not make competitive solicitations open to all qualifying facilities, or do not provide qualifying facilities the ability to sell to the utility outside of a competitive solicitation process. Further, the competitive solicitation process can be overly burdensome and costly for smaller facilities, depriving them of an opportunity to compete on equal terms because the administrative costs of participating in such a solicitation represent a higher percentage of a facility's costs than for larger facilities.

The Commission has considered whether competitive solicitations complied with PURPA on multiple occasions. In *Hydrodynamics Inc.*, 146 FERC ¶ 61193 (2014), the Commission found that requiring a qualifying facility to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a LEO and noted that a qualifying facility's ability to negotiate a contract outside of a competitive

solicitation was not a sufficient alternative because “a utility may refuse to negotiate with a qualifying facility at all.”⁴⁹ The Commission reiterated this rationale in *Windham Solar LLC*, 156 FERC ¶ 61042 (2016). Similarly, a federal court is currently considering whether a competitive solicitation process in Colorado that requires most qualifying facilities to participate in infrequently-held RFPs in order to obtain a long-term contract complies with PURPA.⁵⁰

The argument that competitive solicitation will always satisfy the intent of PURPA also ignores the fact that competitive solicitation implementation varies widely. Not only do many states not require competitive solicitation, only a small number of states with competitive solicitation require all capacity expansions or additions to undergo an RFP process where both the utility and independent power producers bid to meet future capacity needs and an Independent Evaluator not affiliated with the utility runs the RFP. And to our knowledge, no state requires, and no utility conducts, a competitive solicitation to determine how best to meet the ongoing energy needs that it currently meets through the operation of its existing generation fleet and market purchases.

Many states that do require some form of competitive solicitation do not provide a robust process or equitable playing field for non-utility power producers like qualifying facilities to bid and, if successful, construct, own, and operate a generating facility. Florida, for example, does not require an Independent Evaluator as part of its competitive solicitation process.⁵¹ Other states, like Colorado⁵² and Oklahoma,⁵³ allow utilities to apply for waivers of the competitive solicitation requirement.

⁴⁹ *Hydrodynamics Inc.*, 146 FERC ¶ 61193, 61845 (2014).

⁵⁰ *sPower Dev. Co., LLC v. Colorado Pub. Utilities Comm'n*, No. 17-CV-00683-CMA-NYW, 2018 WL 1014142 (D. Colo. Feb. 22, 2018).

⁵¹ Fla. Admin. Code r. 25-22.082.

⁵² 4 Colo. Code Regs. 723-3:3611(c).

⁵³ Okla. Admin. Code 165:35-34-3(e).

While a well-designed and well-implemented competitive solicitation process could be an appropriate procurement tool in some cases, competitive solicitations should never be the only way for qualifying facilities to sell their output, and close consideration should be given to determinations of utility capacity need that could be manipulated to limit renewable energy procurements.⁵⁴

C. Forecasted Avoided Cost Rates Must be Maintained.

State regulatory authorities and nonregulated electric utilities are required to establish avoided cost rates within the parameters established by PURPA and the Commission's regulations.⁵⁵ In addition to receiving properly calculated avoided cost rates, qualifying facilities may also choose to enter into long-term agreements to sell their output. However, EEI argues that qualifying facilities should no longer have the option of choosing a long-term forecasted avoided cost rate, and that a competitive solicitation process or other ill-defined tool should replace long-term rates.

As discussed above, a qualifying facility's ability to choose whether to sell its output as-available or pursuant to a LEO, including the ability to enter into a long-term fixed contract, is a foundational policy supporting qualifying facility development. The Commission has consistently recognized that long-term fixed rates are necessary for qualifying facilities to be

⁵⁴ For example, a recent bill, H.R. 4476—the “PURPA Modernization Act of 2017”—proposed to eliminate the mandatory purchase obligation in states that held competitive procurements or in which the utility's integrated resource plan (“IRP”) indicated the utility had no capacity need. However, tying PURPA obligations to utility integrated resource planning overlooks the fact that although some states engage in robust IRP proceedings that bind future utility resource decisions, many IRPs are procedural exercises that do not obligate the utilities or create presumptive validity for future resource decisions. This is especially true in states in which utilities simply file IRPs without review by state regulators or opportunities for stakeholder input, and for nonregulated electric utilities that are not regulated by a state utilities commission. Tying resource procurement to IRPs or other similar planning documents without sufficient vetting of the actual capacity need would give utilities yet another tool to undermine PURPA. *See* Testimony of Karl R. Rábago before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Energy, “Legislation Addressing LNG Exports and PURPA Modernization” (January 19, 2018).

⁵⁵ 18 C.F.R. § 292.304(e).

able to attract project financing.⁵⁶ These long-term fixed rates remain critical, especially for smaller qualifying facilities in areas without organized markets. Limiting qualifying facilities to the avoided cost at the time of delivery, as recommended by EEI—essentially restricting all qualifying facilities to “as-available” pricing—would undercut the viability of the qualifying facility industry and would frustrate one of the primary policy rationales of PURPA.

However, some commenters argue that long-term avoided cost contracts impose burdens on ratepayers that justify eliminating the availability of long-term contracts with forecasted avoided cost rates. They argue that because avoided costs and wholesale market rates have generally decreased in recent years due to prevailing natural gas prices, if existing long-term contracts were instead priced at current avoided cost or market rates, the lifetime costs of these contracts would decrease. This argument ignores the fact that long-term contracts hedge risk for both customers and suppliers.

Should natural gas prices increase in the future, which is possible if utilities continue to replace retiring coal power with natural gas, then qualifying facilities with fixed rates will act as a hedge, and contracts executed in the present would be at a lower rate than other market suppliers relying on natural gas in the future. A long-term contract with a fixed price is less risky for ratepayers, compared with the cost of burning fossil fuels, whose price can fluctuate widely over the course of just a few months or years. This price certainty provides value to the utility and to ratepayers.⁵⁷

⁵⁶ See e.g., *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880, *order on reh'g sub nom.* Order No. 69 A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983); *JD Wind*, 130 FERC P 61127 (2010); *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61134 (Nov. 22, 2016).

⁵⁷ Direct Testimony of Dr. Ben Johnson on behalf of the North Carolina Sustainable Energy Association, North Carolina Utilities Commission Docket No. E-100, Sub 148 at 85-91 (Mar. 28, 2017)(discussing this principle in the context of Duke Energy’s avoided cost contracts).

Further, long-term contracts lower the costs of financing qualifying facility development and thereby reduce overall costs and increase benefits to ratepayers. A recent analysis from the New York State Energy Research and Development Authority, for example, found that long-term power purchase agreements for 800 MW of offshore wind generation would provide customers with 900 million dollars of cost savings as compared to providing the generators with a fixed Renewable Energy Credit product and forcing them to rely on spot market revenues for energy and capacity.⁵⁸

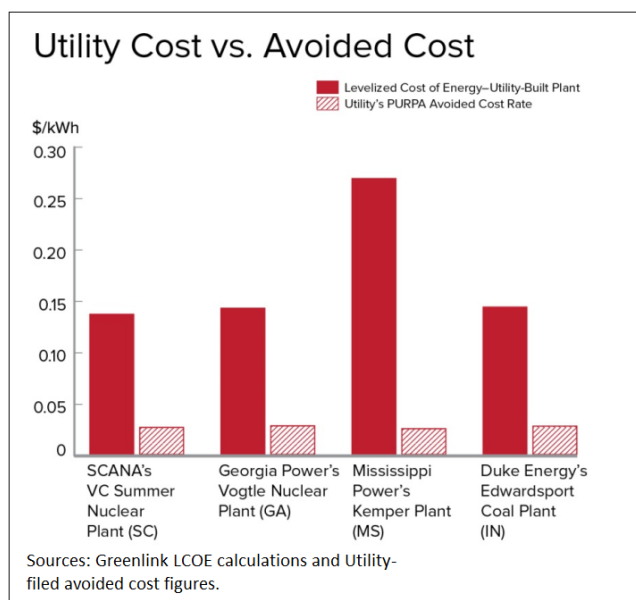
The argument that customers would be better off without long-term contracting also relies on a snapshot of a utility's current avoided cost or market rate and applies it to all existing qualifying facility long-term contracts. This argument overemphasizes recent fuel price decreases which have driven down wholesale rates, assumes speculatively that avoided cost rates will continue to decrease in the future, and ignores the value of price certainty that long-term contracts provide.⁵⁹ In reality, the actual cost that utilities will pay for the fuel they will burn in their fossil-fired generating units is uncertain, and while fuel prices are currently low, any gap between the qualifying facility fixed contract price and the utility's avoided cost could disappear during the remaining years of these contracts if fuel prices return to their historical trend line.

The argument against forecasted avoided cost rates also gives the impression that the existing qualifying facility contracts are necessarily costlier than power produced by a utility's own generating units. This is not true, however, and in some cases utility resource decisions

⁵⁸ New York State Energy Research and Development Authority, Offshore Wind Policy Options Paper, at 40 (Jan. 2018), available at <https://www.nyserda.ny.gov/-/media/Files/Publications/Research/Biomass-Solar-Wind/Master-Plan/Offshore-Wind-Policy-Options-Paper.pdf>.

⁵⁹ See e.g., Direct Testimony of Dr. Ben Johnson on behalf of the North Carolina Sustainable Energy Association, North Carolina Utilities Commission Docket No. E-100, Sub 148 at 85-91 (March 28, 2017)(discussing this principle in the context of Duke Energy's avoided cost contracts).

saddle customers with costs that are substantially higher than the administratively-determined avoided cost rate, as shown in the following figure.



For example, a recent report using FERC Form 1 data found that Duke Energy Indiana's Edwardsport coal gasification plant, since beginning operation in 2013, has cost ratepayers, on average, \$143.19/MWh.⁶⁰ In contrast, the avoided energy cost rate offered by the utility is only \$28.23/MWh, less than one fifth the cost of the Edwardsport IGCC plant.⁶¹ In Georgia and South Carolina, the levelized cost of energy from the planned nuclear facilities Vogtle and V.C. Summer is projected at \$144/MWh and \$138/MWh, respectively.⁶² That is nearly five times the respective avoided cost rates in both states, \$29.60/MWh and \$28/MWh.⁶³ Mississippi's Kemper plant, another massive project cancelled before it reached commercial operation, would

⁶⁰ See Public Direct Testimony of David A. Schlissel at 5:28-32, *In re Petition of Duke Energy Indiana, LLC Seeking Approval to Reflect Costs Incurred for the Edwardsport Integrated Gasification Combined Cycle Generating Facility*, Ind. Util. Regulatory Comm'n Cause No. 43114, Sub Docket No. IGCC 17, (filed on July 31, 2018).

⁶¹ The 2018 avoided energy cost rate is found in Duke Energy Indiana's Standard Contract Rider 50 (2018), <https://perma.cc/MQL4-6UCM>.

⁶² The V.C. Summer plant was cancelled in 2017. This value is based on the projected LCOE if the plant had reached commercial operation.

⁶³ Avoided cost rates based on "Projected 2018 Annual All hours \$/kWh", <http://www.psc.state.ga.us/factsv2/Document.aspx?documentNumber=170653>; and "2018-2022 Avoided cost rate", <https://www.sceg.com/docs/librariesprovider5/electric-gas-rates/rate-pr-2.pdf?sfvrsn=2>.

have cost customers at least \$270/MWh, almost ten times the avoided cost rate.⁶⁴ PURPA continues to play a vital role ensuring that qualifying facility development and non-utility developers of those facilities provides a competitive alternative to these types of utility resource decisions, as Congress intended.

D. The Longstanding Qualifying Facility Self-Certification Process Does Not Need to be Amended.

The Commission's PURPA regulations permit a cogeneration or a small power production facility to certify as a qualifying facility in two ways: (1) the facility owner or operator may file a notice of self-certification with the Commission by completing Form No. 556 or (2) the facility owner or operator may file an application for Commission certification.⁶⁵ Most qualifying facilities file a notice of self-certification. If a facility fails to obtain certification as a qualifying facility, or improperly designates itself as a qualifying facility, the facility owner or operator risks having its certification revoked by the Commission.⁶⁶ This risk serves as an effective deterrent against facilities that might intentionally or unintentionally improperly designate themselves as a qualifying facility.

There is no demonstrated need to amend the existing qualifying facility self-certification process, as requested by EEI.⁶⁷ If qualifying facilities were required to engage in a certification proceeding before the Commission any time a party filed a protest in response to the qualifying facility's certification, as recommended by EEI, qualifying facilities would bear potentially significant additional legal, administrative, and financial burden to litigate each protest. This unnecessary change would also burden the Commission with the administration of these

⁶⁴ In 2017, Southern Company cancelled work on the coal gasification and carbon capture portions of the Kemper plant, leaving it to operate as a natural gas combustion generator. This value is based on the projected LCOE if the plant had reached commercial operation based on its original design.

⁶⁵ 18 C.F.R. § 292.207.

⁶⁶ *E.g., Chugach Elec. Ass'n, Inc. Matanuska Elec. Ass'n, Inc.*, 121 FERC ¶ 61287, 64001 (Dec. 21, 2007).

⁶⁷ EEI Supplemental Comments, Attachment A at 16.

additional proceedings. The existing options for qualifying facility certification under the Commission's existing regulations are sufficient, appropriate, and should be maintained.

IV. Conclusion

The Public Interest Organizations thank the Commission for the opportunity to provide additional comments on these important issues involving the Commission's PURPA regulations and PURPA implementation across the country. PURPA continues to serve a critical role in the encouragement of qualifying facilities to address many of the same issues that led Congress to enact the statute in 1978. As discussed herein, Public Interest Organizations request that any Commission review of its PURPA regulations include a survey of existing implementation by state regulatory authorities and nonregulated electric utilities in order to determine where PURPA implementation does not comply with PURPA and the Commission's regulations, to investigate existing barriers in wholesale markets that prevent nondiscriminatory access for qualifying facilities, and to evaluate opportunities to strengthen PURPA implementation.

Respectfully submitted, this 17th day of October, 2018.

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